Department of Health and Human Services
DEPARTMENTAL APPEALS BOARD
Appellate Division

SUBJECT: Pascua Yaqui Tribe of Arizona
Docket No. A-99-20
Decision No. 1676 (January 12, 1999)

DATE: February 11, 1999

RULING ON REQUEST FOR RECONSIDERATION

On January 28, 1999, Indian Health Service (IHS) submitted a request for en banc review or reconsideration of the decision identified above. IHS asserted that the decision contained errors of fact and law that warrant its reversal.

The procedures applicable to this case are those in 25 C.F.R. 900.165 (1996), as modified by the Secretary's August 16, 1996 delegation to the Departmental Appeals Board, Appellate Division, of her authority to review ALJ decisions. There is no provision in that regulation for review by the Board en banc or for reconsideration by the deciding official. Indeed, the procedures provide very tight deadlines for the review by the Secretary of the ALJ's recommended decision, as discussed in footnote 1 of the decision. Moreover, the procedures at 45 C.F.R. Part 16 cited by IHS are not applicable at all to the appeal at issue. Nevertheless, in spite of the absence of any express authority for reconsideration, it could be argued that the deciding official has inherent authority to reconsider a decision where there has been a prompt demonstration of a clear error of fact or law. This Department would not be well served in the program in question if it could not reconsider a decision that was promptly demonstrated to be erroneous.

I have carefully considered the arguments in support of the request by both IHS and the Department of the Interior in an "amicus" brief as well as the arguments presented by Appellant in a response brief. For reasons discussed below, I conclude that even if I have inherent authority to reconsider my decision, there is no basis to do so here. The IHS request fails to demonstrate any clear error of law or fact and, instead, completely mischaracterizes the scope and effect of the decision.

The issue raised by the ALJ's dismissal order was whether the ALJ properly dismissed Appellant's hearing request as "moot." That request concerned the validity of Appellant's contract proposal under the Indian Self-Determination Act (ISDA). Appellant submitted the contract proposal at issue to IHS on July 21, 1997. IHS partially declined that proposal on October 21, 1997 and Appellant subsequently

requested a hearing on the record. The ALJ held an in-person evidentiary hearing in June 1998 and the parties then submitted post-hearing briefs. The ultimate issue pending before the ALJ was whether IHS had clearly demonstrated the ground for the declination to be valid. ISDA, § 102(e)(1); 25 C.F.R. § 900.163. Instead of reaching this issue, however, the ALJ, by order dated November 23, 1998, dismissed Appellant's appeal for "mootness." The ALJ concluded that even if Appellant prevailed on the merits of its appeal, no funding for any contract proposal was then available under applicable appropriations authorities. Specifically, the ALJ concluded that funding would not be available under the omnibus appropriations bill for fiscal year 1999, which prohibits the use of fiscal year 1999 funds to enter into any "new" contracts under the ISDA.

Thus, the very narrow issue raised by the ALJ's dismissal order was whether the ALJ properly interpreted the term "new" contract within the meaning of the fiscal year 1999 appropriations bill to include any contract resulting from Appellant's 1997 proposal that may be approved on appeal. I concluded that the ALJ did not properly interpret that term to include any such contract here, and that the ALJ therefore should not have dismissed Appellant's hearing request for mootness.

As discussed in my decision, the ultimate issue posed by Appellant's hearing request is whether IHS's declination of October 21, 1997 was "valid." If the ALJ concludes that the declination of October 21, 1997 was not valid, the effect of his decision would be to find that Appellant's proposal should lawfully have been approved on that date. Thus, it was altogether reasonable to conclude that any contract approved on appeal would not be a "new" fiscal year 1999 contract, but rather would be a prior year's contract that was invalidly or unlawfully declined based on the law then in effect. In arguing that my decision was erroneous, IHS ignores the existence of the July 21, 1997 contract proposal as well as the October 21, 1997 declination that had been pending on appeal for over a year and that was subject to reversal as "invalid." The IHS interpretation places Appellant in precisely the same position as a tribe that had first submitted a new contract proposal in fiscal year 1999. That interpretation of the appropriations bill language at issue is not required and is inconsistent with the appeals process for self-determination contracts that is expressly authorized by statute.

IHS nevertheless argued in its request that any contract approved on appeal must be considered a "new" contract because there can be no "meeting of the minds" between Appellant and IHS until after the appeal has been resolved. IHS cited basic principles in the law of contract formation in support of this position. But IHS again misconstrues the core issue before the ALJ. That issue is not whether there was a meeting of the minds (or there can now be a meeting of the minds), but rather whether the party that declined to contract in the first place acted invalidly or unlawfully. Thus, the traditional law on contract formation cited by IHS and the

Amicus is not directly applicable to the narrow issue of statutory construction raised here.

The main thrust of the IHS request appears to suggest that my decision would have wide-ranging effects on the use of limited funding available for self-determination contracts and for other related programs administered by IHS or the Department of the Interior. These arguments, however, are premised on a fundamental misconception of the scope and effect of my decision. My decision considered a very narrow issue concerning the effect of a single appropriations bill on a preexisting declination appeal that was pending at the time that the bill was enacted. IHS did not argue in its request that there was even one additional such contract appeal that would be affected by the decision's holding.

IHS' arguments instead appear to be premised on the assumption that I resolved substantive issues concerning the validity of the contract proposal, including issues pertaining to retrospective contract remedies argued by Appellant. These were the very issues in contention during the hearing and were to be resolved by the ALJ in his decision. Contrary to what IHS argued, I did not attempt to resolve any of these issues. Indeed, I emphasized that I "expressly" made no finding on the very issue that appears to be most troubling for IHS, the issue of whether Appellant would be entitled to retroactive funding under the contract regardless of whether Appellant had in fact assumed responsibility for the operation of a program during that period. Since it was not my intent then or now to resolve that issue (which was not even briefed by the parties as an issue before me), it is not appropriate for me to analyze here why that issue may be substantively different from (or similar to) the issue I resolved. The ALJ should still have unfettered ability to address the full range of substantive issues raised by the original appeal, including this critical issue.

IHS also argued that I erred in finding that Appellant remains in the queue for contract support costs as of its July 21, 1997 proposal date. Although IHS expressly made the commitment to place Appellant in the queue as of that date in its October 21, 1997 partial declination, IHS now argues that Appellant was never placed in the fiscal year 1998 queue. However, any subsequent action by IHS concerning the queue does not undercut my reliance on IHS' express commitment on October 2 1, 1997 to place Appellant in the queue as of the date of its proposal, a date that IHS obviously knew would precede the tribe's assumption of any program responsibilities. Moreover, although Appellant acknowledged in its opposition to IHS' request that it was not currently listed in the latest queue, Appellant suggested that its placement in the queue remains a disputed issue in its appeal before the ALJ. Finally, while I relied on the October 21, 1997 queue commitment as support in my analysis of the legislative purpose behind the appropriations bill, I would also note that the parties did not cite to anything in the history of the bill to suggest that it was

intended to limit the expenditure of contract support costs that relate back to contract proposals from prior fiscal years that had been invalidly declined by IHS.

I also disagree with the implication by IHS in several of its arguments that the dispute before me is in reality a dispute between one tribe and all other tribes for a limited pool of funding. Obviously, whenever a tribe requests funding under the ISDA, it necessarily places itself in competition with other tribes for the limited funding available. My decision, however, does not resolve any issue associated with the merits of Appellant's proposal for funding. Rather, my decision addresses the threshold issue of whether language in an appropriations bill has been properly interpreted, consistent with the appeals process authorized by statute for self determination contracts, to "moot" out Appellant's pending hearing request.

Finally, I should note that even if I had concluded that funding was barred for the contract proposal here by the fiscal year 1999 appropriations bill, I would still have questioned the propriety of the ALJ having dismissed Appellant's hearing request for "mootness." The effect of the moratorium for the funding of "new" contracts in the appropriations bill is time-limited. By the time Appellant receives a final administrative decision on the validity of its proposal and begins to implement that proposal, the moratorium may have expired. If Appellant must re-submit its proposal after the moratorium has expired, Appellant could lose an additional year or more before it receives a decision on the validity of its proposal. Moreover, as I noted in my decision, aside from issues concerning the availability of funding under the fiscal year 1999 appropriations bill, Appellant's appeal raised a host of additional issues under other appropriations authorities, which were not considered by the ALJ. Indeed, the availability of funding under these other authorities may be subject to change as time passes while Appellant's appeal remains in pending status. Ultimately, it would appear that the availability of funding for a contract proposal such as Appellant's is something of a moving target, and that it would be unreasonable and unfair to require Appellant to demonstrate the availability of full funding with absolute certainty at any given moment before allowing Appellant to receive a decision on the merits of its proposal.

Conclusion

On the basis of the foregoing, even if I have inherent authority to reconsider my decision on this threshold matter, I would not do so here, because there has been no demonstration of a clear error of fact or law.

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Donald F. Garrett
Member, Departmental Appeals Board